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Supreme Court, U. S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1971

No. 71-1569

JIWAN SINGH, *Petitioner,*

vs.

IMMIGRATION AND NATURALIZATION SERVICE and CECIL W. FULLILOVE, District Director, IMMIGRATION AND NATURALIZATION SERVICE, San Francisco District, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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JIWAN SINGH, *Petitioner,*

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IMMIGRATION AND NATURALIZATION SERVICE and CECIL W. FULLILOVE, District Director, IMMIGRATION AND NATURALIZATION SERVICE, San Francisco District, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

The petitioner, Jiwan Singh, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming a final order of the Immigration and Naturalization Service.

OPINIONS BELOW

The decision of the Special Inquiry Officer terminating the administrative action in rescission commenced by the District Director under the provisions of Sec-

tion 246 of the Immigration and Nationality Act (66 Stat. 217, 8 U.S.C. 1256) on the ground that said action was barred by the statute of limitations, is set forth in the certified District Court record (R. 41-47, 60), and is printed in Appendix J hereto, infra, p. 39.

The decision of the Board of Immigration Appeals, dated December 19, 1969, reversing the decision of the Special Inquiry Officer, holding that the five (5) year statute of limitation period was tolled by service of the "Notice of Intention to Rescind" (printed in Appendix K hereto, infra, p. 46), is set forth in the certified District Court record (R. 12-22), and is printed in Appendix I hereto, infra, p. 28.

On February 16, 1970 petitioner herein filed in the United States District Court in and for the Northern District of California a Petition for Review of Administrative Action and for Declaratory Judgment, (5 U.S.C. 701, et seq., 28 U.S.C. 2201) which is set forth in the certified District Court record (R. 1-3), and printed in Appendix H hereto, infra, p. 25. The Memorandum Opinion Granting Plaintiff's Motion for Summary Judgment, George B. Harris, United States District Judge, filed May 27, 1970, is set forth in the certified District Court record (R. 74-78), is printed in Appendix F hereto, infra, p. 18 and is reported at 313 F.Supp. 532. The Order and Judgment of the District Court is set forth in the certified District Court record (R. 80), and is printed in Appendix G hereto, infra, p. 23.

The opinion of the Court of Appeals for the Ninth Circuit, reversing the decision of the District Court,

is printed in Appendix A hereto, infra, p. 1, and is reported in the official reports at ..... F.2d .....

JURISDICTION

The Judgment of the Court of Appeals for the Ninth Circuit was filed and entered on February 24, 1972 (Appendix B, infra, p. 12) A Petition for Rehearing and Suggestion for Hearing In Banc was filed in the Court of Appeals on March 9, 1972.

In an Order filed on April 13, 1972 (Appendix C, infra, p. 13), the panel voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

On April 26, 1972 the Court of Appeals entered and filed an Order staying issuance of Mandate until May 13, 1972 (Appendix D, infra, p. 14). On May 17, 1972 the Court of Appeals entered and filed an Order staying issuance of mandate until June 2, 1972 (Appendix E, infra, p. 16).

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Whether the five-year limitation period in Section 246(a) of the Immigration and Nationality Act, 8 U.S.C. 1256(a), rescission of an alien's adjustment of status to permanent residence, is tolled when the District Director serves the alien, within thirty days

of expiration of the five-year limitation period, with a notice of intent to rescind unless the alien denies the allegations therein or demands a hearing within thirty days, and the alien does, within the thirty-day period, deny the allegations and demands a hearing?

Whether, after an alien has denied the allegations in a notice of intent to rescind, the statutory phrase "appear to the satisfaction of the Attorney General" in Section 246(a) of the Immigration and Nationality Act, 8 U.S.C. 1256(a), rescission of an alien's adjustment of status to permanent residence, requires a formal hearing and decision within the five-year limitation set forth in the same section of law?

Whether the status of an alien adjusted to that of an alien lawfully admitted for permanent residence can be rescinded under Section 246(a) of the Immigration and Nationality Act, 8 U.S.C. 1256(a), without any hearing which meets the Constitutional standards of due process of law?

STATUTES AND RULES INVOLVED

Section 246(a) of the Immigration and Nationality Act, insofar as pertinent herein, provides:

> "(a) * * * If, at any time within five years after the status of a person has been otherwise adjusted under the provisions of section 245 or 249 of this Act or any other provision of law to that of an alien admitted for permanent residence, it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible for such adjustment of status, the Attorney Gen-

eral shall rescind the action taken granting an adjustment of status to such person and cancelling deportation in the case of such person if that occurred and the person shall thereupon be subject to all provisions of this Act to the same extent as if adjustment of status had not been made." Enacted June 27, 1952, 66 Stat. 217, 8 U.S.C. 1256(a).

The administrative regulations of the Immigration and Naturalization Service, 8 C.F.R. 245, in effect at the time of the administrative action taken in the instant matter, are printed in Appendix L, infra, p. 51. The administrative regulations of Immigration and Naturalization Service, 8 C.F.R. 245, in effect at the time of the decision of the Court of Appeals for the Third Circuit in *Quintana v. Holland,* 255 F.2d 161 (1958), are printed in Appendix M, infra, p. 58.

STATEMENT OF THE CASE

Petitioner's application for adjustment of status to that of an alien admitted for permanent residence under Section 245 of the Immigration and Nationality Act, 8 U.S.C. 1255, was granted by the Immigration and Naturalization Service on October 18, 1963 (R. 66, allegation 7, printed in Appendix K, infra, p. 49).

On September 12, 1968, the Acting District Director, San Francisco District, Immigration and Naturalization Service mailed to petitioner a letter of notification that the Service intended to rescind petitioner's permanent resident status thirty (30) days after receipt

of the notice, on the grounds set forth in the attachment, unless petitioner denied the charges in writing or requested a hearing before a Special Inquiry Officer (R. 64-67). The letter dated September 12, 1968, and the attachment referred to therein, are printed in Appendix K, infra, p. 46. The letter and attachment were mailed to petitioner pursuant to regulations set forth in 8 C.F.R. 246.1 (Appendix L, infra, p. 51).

Petitioner received the letter of notification on September 19, 1968, a date within the five-year statute of limitation period, but less than thirty (30) days prior to expiration of the five-year statutory period following adjustment of his status to that of a permanent resident on October 18, 1963.

On October 11, 1968, petitioner, following the instructions set forth in the letter of notification, by letter denied the charges and requested that he be accorded a hearing before a Special Inquiry Officer on the District Director's charges (R. 63), as he had a right to do under 8 C.F.R. 246.3 (Appendix L, infra, p. 53).

The first and only hearing in rescission proceedings was held before a Special Inquiry Officer on December 6, 1968, a date more than five-years after petitioner's adjustment of status to that of a permanent resident on October 18, 1963 (R. 48-61). On that date the Special Inquiry Officer granted petitioner's motion to terminate the proceedings, holding that no determination had been made within the five-year statute of limitation period specified in Section 246(a) of the

Immigration and Nationality Act (R. 41-47, Appendix J, infra, p. 39).

The Immigration and Naturalization Service appealed to the Board of Immigration Appeals. On December 19, 1969, the Board sustained the Service appeal, holding that the service of the "Notice of Intention to Rescind", setting forth the facts to be proved, within the five-year statutory period tolled the running of the time limitation (R. 12-22, Appendix I, infra, p. (28)).

On February 16, 1970, Petitioner filed the instant declaratory judgment action (5 U.S.C. 701 et seq., 28 U.S.C. 2201) in the United States District Court for the Northern District of California to review the decision of the Board of Immigration Appeals (R. 1-4, Appendix H, infra, p. 25). Both parties moved for summary judgment (R. 7-10, 69-73). On May 27, 1970, the District Court entered its Memorandum Opinion granting Petitioner's motion for summary judgment (R. 74-78, Appendix F, infra, p. 18, reported 313 F.Supp. 532). The District Court, relying on *Quintana v. Holland,* 255 F.2d 161 (C.A. 3, 1958), as had the Special Inquiry Officer, in essence held that the statute required a hearing and decision by the Special Inquiry Officer, when such hearing was requested, within the five year statutory period.

On February 24, 1972 the Court of Appeals for the Ninth Circuit, after stating that "This case presents a perplexing question of statutory construction" (Appendix A, infra, p. 1) and "The phrase, 'shall rescind the action taken,' can be read to require

merely the institution of rescission proceedings by service of a notice just as easily as it can be read to require a final decision following a formal hearing." (Appendix A, infra, p. 6) reversed the decision of the District Court, holding, after citing a change in the administrative regulations, that the statute did not require a hearing or a decision within the five-year period. The decision of the Court of Appeals for the Ninth Circuit is fully set forth in Appendix A, infra, p. 1.

REASON FOR GRANTING CERTIORARI

This writ of certiorari is sought because the decision of the Court of Appeals for the Ninth Circuit is contrary to a decision of Court of Appeals for the Third Circuit involving the same question of statutory construction and is in conflict with applicable decisions of this Court holding where there is "some doubt as to the correct construction of the statute, the doubt should be resolved in favor of the alien". In addition the issues present herein raise important questions of procedural due process of law as well as important questions pertaining to the administration of the immigration and nationality laws of the United States.

The pertinent parts of the statute involved here provide that if "at any time *within five years* after the status of a person has been otherwise adjusted * * * to that of an alien lawfully admitted for permanent residence, it *shall appear to the satisfaction of the Attorney General* that the person was not in

fact eligible for such adjustment of status, the Attorney General shall rescind the action taken * * *." (Italics ours). Construction of the foregoing statute is the issue before this Court. We agree with respondent's statement[1] that "The legislative history on this point is sparse and equally unenlightening".

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1. CONTRARY TO DECISION OF THIRD CIRCUIT

In *Quintana v. Holland*, 255 F.2d 161, 164 (1958) the Court of Appeals for the Third Circuit when considering a similar case involving recission proceedings under the identical section of law stated:

> "What is the described action the Attorney General must take? In our opinion the giving of notice within the five-year period is not enough. The statute uses the words 'it shall appear to the satisfaction of the Attorney General' and so forth. *We think that something appearing to an officer's 'satisfaction' means that he must have something more than a hunch about it, or even more than that he may be convinced in his own mind. We think it means a reasonable determination made in good faith after such investigation and hearing as is required.*" (Italics ours)

No hearing was held in the instant case until more than five years after petitioner's adjustment of status to that of a permanent resident.

The Court of Appeals for the Ninth Circuit distinguished the two cases holding that "Subsequent

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[1]Appellant's brief, Court of Appeals, page 5, footnote 4.

changes in the regulations governing rescission, moreover, undermine the applicability of *Quintana* to the present case. The regulations in effect when *Quintana* was decided required, as do the present regulations, service by a district director of a notice of intent to rescind as the first step toward rescission".[2] In discussing the change in the regulations the Court pointed out that the regulations in effect when *Quintana* was decided[3]—

> "Provided for a 'personal appearance' or 'interview' before an 'immigration officer' rather than a 'hearing' before a 'special inquiry officer!' More important than these changes in terminology is the fact that under the old regulations the immigration officer did not make a decision after the personal appearance; he merely prepared a 'report and recommendation!' It was the district director who decided whether rescission was appropriate."[4]

The regulations in effect at the time of the present hearing[5] did not expand but actually limited petitioner's rights in rescission proceedings. They did not provide for a "personal appearance" or "interview" before an "immigration officer" nor a "report and recommendation" before the district director decided whether or not rescission was appropriate. As stated by the Court of Appeals, "While prosecutorial duties

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[2]Appendix A, infra, p. 6.

[3]8 C.F.R. 246, 19 F.R. 9179 (Dec. 24, 1954), printed Appendix M, infra, p. 58.

[4]Appendix A, infra, pp. 6-7.

[5]8 C.F.R. 246, 28 F.R. 6737 (June 29, 1963), printed Appendix L, infra, p. 51.

are still delegated to the district director, the responsibility for deciding whether rescission is appropriate lies solely with an independent special inquiry officer."[6]

In *Quintana,* supra, the Third Circuit held that the phrase "appear to the satisfaction of the Attorney General," required a formal hearing and a determination within the five-year period. No hearing or determination was made in this case within the five-year period; however, the decision of the Court of Appeals for the Ninth Circuit, contrary to the decision of the Third Circuit in *Quintana,* holds that the mailing of the notice of intent to rescind by the district director, performing his "prosecutorial duties" tolls the five-year statute of limitations.

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2. CONSTRUCTION OF THE STATUTE

In *Immigration Service v. Errico,* 385 U.S. 214 (1966), at page 225, 17 L.Ed.2d 318, 87 S.Ct. 473, this Court stated:

> "Even if there were some doubt as to the correct construction of the statute, the doubt should be resolved in favor of the alien. As this Court has held, even where a punitive section is being construed:
>
> 'We resolve the doubts in favor of that construction because deportation is a drastic measure at times the equivalent of banishment or exile, *Delgadillo v. Carmichael,* 332 U.S. 388 (92 L.Ed. 17, 68 S.Ct. 10). It is the forfeiture for misconduct

[6]Appendix A, infra, p. 8.

> of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.' *Fong Haw Tan v. Phelan,* 333 U.S. 6, 10, 92 L.Ed. 433, 436, 68 S.Ct. 374."

In conflict therewith, the Court of Appeals, after stating in the opening sentence of their decision that "This case presents a perplexing question of statutory construction", held:

> "The phrase, 'shall rescind the action taken,' can be read to require merely the institution of rescission proceedings by service of a notice just as easily as it can be read to require a final decision following a formal hearing. The language of §246(a), in short, does not preclude a tolling of the statute by the service of a notice, and is not determinative of the issue before this Court." (Appendix A, infra, p. 6)

The foregoing, contrary to recognized rules of statutory construction, defeats the presumption "that every word, sentence, or provision was intended for some useful purpose, has some force and effect, and that some effect is to be given to each, and also that no superfluous words or provisions were used".[7] The statute here involved specifically provides that the "Attorney General shall rescind the action taken" only

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[7]82 C.J.S. 551.

if "it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible for such adjustment of status".

The decision of the court below fails to recognize the expressed legislative intent that rescission must be preceded by an affirmative determination that the alien was not entitled to adjustment of status.

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3. DUE PROCESS OF LAW

A rescission proceeding, whether it is considered as analogous to an expulsion proceeding or a denaturalization proceeding, must meet the minimum standards of due process of law.

In the *Japanese Immigrant Case*, 189 U.S. 86, 100-101, this Court stated:

> "But this court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of adoption of the Constitution. One of these principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard, before such officers, in respect of the matters upon which that liberty depends— * * *."

This Court in *Woodby v. Immigration Service*, 385 U.S. 276, 286, 17 L.Ed.2d 362, 369, 87 S.Ct. 483 held "* * * no deportation order may be entered unless it is found by clear, unequivocal, and convincing evi-

dence that the facts alleged as grounds for deportation are true." The same burden of proof has been imposed by this Court in denaturalization cases. *Schneiderman v. United States,* 320 U.S. 118, 125, 87 L. Ed. 1796, 63 S.Ct. 1333.

As was stated by the Court of Appeals in *Quintana v. Holland,* supra, 255 F. 2d at page 164:

> "We think that something appearing to an officer's 'satisfaction' means that he must have something more than a hunch about it,[8] or even more than that he may be convinced in his own mind. We think it means a reasonable determination made in good faith and after such investigation and hearing as is required."

The pertinent regulations applicable in this case clearly indicate that the district director's authority to make a determination and rescind adjustment of status is restricted and applies only where an alien admits the allegations in the notice, or files no answer within the thirty-day period, or no hearing is requested. 8 C.F.R. 246.2, Appendix L, infra, pp. 52-53. Those regulations further provide that where the alien contests or denies the allegations in the notice, or requests a hearing "* * * a hearing shall be conducted by a special inquiry officer and the procedure specified in §§242.10, 242.11, 242.12, 242.13, 242.14(c), (d) and (e), and 242.15 of this chapter shall apply." 8 C.F.R. 246.3, Appendix L, infra, p. 53.

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[8]See Webster, New International Dictionary 2220 (2d ed. 1939): Satisfy: "To free from doubt, suspense, or uncertainty, to give assurance to; to set at rest the mind of; to convince. * * *" See also *State ex rel. Kirks v. Allen,* Mo. App. 1953, 255 S.W.2d 144, 149; *State v. Chapman,* 1890, 1 S.D. 414, 47 N.W. 411, 412.

This petitioner, within the period of time prescribed in the regulations, did deny the allegations in the notice and did request a hearing. The procedure specified in the regulations are those applicable to deportation hearings. Until such hearing was held there could be no determination as to the validity of the charges set forth in the notice mailed to petitioner by the district director.

Where, as under the facts stated herein, the regulations require a hearing, it must be a fair hearing which meets all of the requirements of procedural due process of law. *Wong Yang Sung v. McGrath,* 339 U.S. 33, 49-50, 94 L.Ed. 616, 70 S.Ct. 445 (1950). Until there has been such a hearing, the district director cannot constitutionally act as both prosecutor and judge, nor make a reasonable determination in good faith that the allegations set forth in the notice of intent to rescind are supported by clear, unequivocal, and convincing evidence, a finding which must be made within the five-year statutory period.

CONCLUSIONS

The statute requires the Attorney General to find, within five years from the date of adjustment of status, that there is clear, unequivocal, and convincing evidence that the person was not in fact eligible for adjustment of status. By regulation, the authority to make such a finding has been delegated, when the allegations of the notice of intent to rescind have been denied or when the person has requested a hearing,

to a special inquiry officer. Until there has been a final decision by the special inquiry officer, the statutory requirement "it shall appear to the satisfaction of the Attorney General", has not been discharged.

For the reasons set forth above, it is respectfully submitted that the petition for writ of certiorari should be granted.

Dated, San Francisco, California,
May 26, 1972.

JOSEPH S. HERTOGS,
Attorney for Petitioner.

(Appendices Follow)

Appendix A

[Corrected Copy]

United States Court of Appeals
For the Ninth Circuit

No. 26,512

Jiwan Singh,
Plaintiff-Appellee,

vs.

Immigration and Naturalization Service and Cecil W. Fullilove, District Director, Immigration and Naturalization Service, San Francisco District,
Defendant-Appellant.

[February 24, 1972]

Appeal from the United States District Court
for the Northern District of California

Before: DUNIWAY and TRASK, Circuit Judges, and PREGERSON,* District Judge

PREGERSON, District Judge:

This case presents a perplexing question of statutory construction. The sole issue before this Court is the proper interpretation of a statute of limitations

*Honorable Harry Pregerson, United States District Court Judge for the Central District of California, sitting by designation.

provision in the Immigration and Nationality Act of 1952, as amended [hereinafter, "the Act"], 8 U.S.C. §§ 1101 *et seq.*

Jiwan Singh is a citizen of India who entered the United States as a nonimmigrant student on January 10, 1959.[1] On July 24, 1963, he married a United States citizen, and thereafter he applied to the Immigration and Naturalization Service [hereinafter, "the Service"] for adjustment of his status to that of an alien admitted to the United States for permanent residence. The Service, acting pursuant to § 245(a) of the Act, 8 U.S.C. § 1255(a), granted the adjustment of status on October 18, 1963.[2]

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[1]Section 221(a) of the Act, 8 U.S.C. § 1201(a), authorizes the issuance of visas to aliens by United States consular officers. The section divides visas into two broad categories. Aliens who seek entry for certain specific reasons enumerated in § 101(a)(15) of the Act, 8 U.S.C. § 1101(a)(15)—*e.g.*, study, business, tourism—must obtain nonimmigrant visas, which authorize the alien to enter the country and remain for a specified period of time, the precise duration of which depends on the purpose of the alien's visit. Other aliens must apply for immigrant visas, which authorize entry and permanent residence. The Act severely restricts the availability of immigrant visas. Act, § 201(a); 8 U.S.C. § 1151(a); *see* n. 2, *infra*.

[2]Ordinarily, an alien who wishes to reside permanently in the United States must appear before a consular officer, establish his eligibility for an immigrant visa, and after having obtained one, travel to the United States. *See* Act, §§ 204, 221, 222; 8 U.S.C. §§ 1154, 1201, 1202. Section 245(a), however, establishes a procedure pursuant to which an alien who has already entered the country as a nonimmigrant can secure an adjustment of his status to that of a permanent resident without actually leaving the United States, appearing before a consular officer, and then reentering the country with an immigrant visa. The applicant for adjustment of status must establish that he would be eligible for an immigrant visa if he were not already in the United States and that such a visa would be available to him. Act, § 245(a); 8 U.S.C. § 1255(a).

The availability of immigrant visas—and, hence, of adjustments of status—is restricted: § 201(a) of the Act, 8 U.S.C. § 1151(a), authorizes the issuance of only a limited number of immigrant visas during any one year. Spouses of United States citizens, how-

Section 246(a) of the Act, 8 U.S.C. § 1256(a), provides, in part,

> "If, at any time within five years after the status of a person has been otherwise adjusted under the provisions of section 245 or 249 of this Act or any other provision of law to that of an alien lawfully admitted for permanent residence, it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible for such adjustment of status, the Attorney General shall rescind the action taken granting an adjustment of status to such person * * * and the person shall thereupon be subject to all provisions of this Act to the same extent as if the adjustment of status had not been made."

On September 12, 1968, within five years after the Service had adjusted Singh's status, the Service's District Director in San Francisco mailed to Singh a notice of his intention to rescind the adjustment of Singh's status pursuant to § 246(a).[3] The notice alleged that Singh and his spouse had never cohabited

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ever, fall within an exception to this general framework; § 201(b), 8 U.S.C. § 1151(b) exempts them from the numerical limitations imposed by § 201(a). A valid marriage to a United States citizen, therefore, ordinarily entitles an alien to immediate entry as an immigrant or to immediate adjustment of status.

It should be pointed out that at the time Singh's status was adjusted, the limited number of immigrant visas available under § 201(a) were distributed on the basis of a national origin quota system. Congress abolished that quota system in 1965, Pub. L. 89-236, and substituted a system of preferences based on skills and on familial ties to United States citizens and permanent residents. *See* Act, § 203(a); 8 U.S.C. § 1153(a). Under this new regime spouses of United States citizens are still exempt from § 201(a)'s numerical limitations.

[3]Section 103(a) of the Act, 8 U.S.C. § 1103(a), authorizes the Attorney General to appoint employees of the Immigration and Naturalization Service and to delegate to them "any of the duties

as husband and wife; that Singh had contracted the marriage for the sole purpose of obtaining permanent residence status; and that, as a result, Singh's marriage was not valid for the purpose of obtaining an adjustment of his status.[4] Singh received the notice on September 19, 1968, which was still within the five-year period specified in § 246(a), and on October 11, 1968, which was also within the five-year period, Singh denied the District Director's allegations and requested a hearing before a special inquiry officer of the Service.[5] The five-year period expired on October 18, 1968.

At a hearing held on December 6, 1968, the special inquiry officer, upon Singh's motion, terminated the

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and powers imposed upon him" by the Act. The section also authorizes the Attorney General to promulgate such regulations "as he deems necessary for carrying out his authority" under the Act.

The regulations that govern rescission of adjustment of status provide, in part,

> "If it appears to a district director that a person residing in his district was not in fact eligible for the adjustment of status made in his case, a proceeding shall be commenced by the service upon such person of a notice of intention to rescind which shall inform him of the allegations upon which it is intended to rescind the adjustment of his status." 8 C. F .R. § 246.1.

[4]As required by Regulation 246.1, the notice also informed Singh that he could, within thirty days, submit a sworn answer setting forth reasons why the adjustment of his status should not be rescinded; that he could request a hearing before a special inquiry officer; and that he could, without expense to the government, be represented by counsel at the hearing.

[5]Under 8 C. F. R. § 246.2 admission by the alien of the district director's allegations or failure to answer them within thirty days results in rescission of the adjustment of status. Regulation 246.3, on the other hand, provides that if the alien, within thirty days, files "an answer which contests or denies any allegation in the notice" or simply requests a hearing, "a hearing pursuant to § 246.5 shall be conducted by a special inquiry officer." The procedures governing such hearings are set forth in Regulations 242.10, 242.11, 242.12, 242.13, 242.14(c), (d), and (e), and 242.15.

rescission proceeding on the grounds that it was barred by the five-year limitation provision. The special inquiry officer interpreted § 246(a) to require a hearing before a special inquiry officer and a decision by that officer within the five-year period. The Service appealed to the Board of Immigration Appeals,[6] which sustained the Service's appeal on December 19, 1969. The Board held that service of a notice of intention to rescind within the five-year period tolled the statute of limitations.

On February 16, 1970, Singh brought suit in the United States District Court for the Northern District of California to review the decision of the Board.[7] The District Court granted summary judgment in favor of Singh, reversing the Board's decision, on May 27, 1970. The Service promptly appealed to this Court. We find the Service's arguments more persuasive than Singh's and, accordingly, reverse the District Court's decision.

Singh urges this Court to follow *Quintana v. Holland,* 255 F. 2d 161 (3rd Cir. 1958), in which the Court of Appeals for the Third Circuit held that service of a notice of intention to rescind did not suffice to toll the statute of limitations. The Court reasoned that a district director's conclusion that an alien had

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[6]The Board of Immigration Appeals is established by 8 C. F. R. § 3.1(a), and its operations are governed by 8 C. F. R. Part 3. Appeals to the Board from the decisions of special inquiry officers in rescission proceedings are authorized by 8 C. F. R. §§ 3.1(b)(8) and 246.7.

[7]Singh brought the suit under the Declaratory Judgment Act, 28 U.S.C. § 2201, and the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.*

apparently not been eligible for an adjustment of his status was but a preliminary determination and did not meet the requirement of § 246(a) that "it shall appear to the satisfaction of the Attorney General." Nothing could "appear to the satisfaction of the Attorney General," the Court reasoned, until after a formal hearing had been held.

The language of § 246(a), however, does not compel the conclusion reached in *Quintana*. The section simply fails to specify precisely what action must be taken within the prescribed limitation period. The phrase, "shall rescind the action taken," can be read to require merely the institution of rescission proceedings by service of a notice just as easily as it can be read to require a final decision following a formal hearing. The language of § 246(a), in short, does not preclude a tolling of the statute by the service of a notice, and it is not determinative of the issue before this Court.[8]

Subsequent changes in the regulations governing rescission, moreover, undermine the applicability of *Quintana* to the present case. The regulations in effect when *Quintana* was decided required, as do the present regulations, service by a district director of a notice of intent to rescind as the first step towards rescission.[9] In the event that the alien wished to contest the rescission, however, former Regulation 246.12(b) provided for a "personal appearance" or "interview"

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[8]Furthermore, Singh and the Service agree that the legislative history of § 246(a) is equally "unenlightening." "Brief for the Appellant," p. 5, n. 4; "Appellee's Reply Brief," p. 3.

[9]8 C. F. R. § 246.11(a), 19 F. R. 9179 (Dec. 24, 1954); *cf.* 8 C. F. R. § 246.1, 28 F. R. 6737 (June 29, 1963). *See, however,* n. 15, *infra.*

before an "immigration officer," rather than a "hearing" before a "special inquiry officer."[10] More important than these changes in terminology is the fact that under the old regulations the immigration officer did not make a decision after the personal appearance; he merely prepared a "report and recommendation." It was the district director who decided whether or not rescission was appropriate.[11] The same individual who initiated the rescission proceedings, in other words, decided the outcome of those proceedings. Therefore the Court in *Quintana* had to reckon with the distinct possibility that a district director, acting on the basis of mere suspicion, might toll § 246(a) by service of a notice of intent to rescind and then delay the prosecution of the rescission proceedings so that his staff could complete its investigation—a possibility that would defeat the very purpose of a statute of limitations.[12]

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[10] 8 C. F. R. § 246.12(b), 19 F. R. 9179 (Dec. 24, 1954); *cf.* 8 C. F. R. § 246.3, 29 F. R. 13243 (Sept. 24, 1964). Under the former regulations evidence, including the testimony of witnesses, could be received at the personal appearances. *Id.*

[11] 8 C. F. R. § 246.12(b), 19 F. R. 9179 (Dec. 24, 1954); *cf.* 8 C. F. R. § 246.6, 27 F. R. 10789 (Nov. 6, 1962).

[12] The precise facts in *Quintana* vividly demonstrate this potential abuse. After the district director had served Quintana with a notice of intent to rescind, in which he alleged that Quintana had been ineligible for adjustment of his status because of membership in the Communist Party, the immigration officer to whom the case was assigned reported that the Service had failed to establish that charge. The district director subsequently reopened the case after the five-year period had elapsed and referred the matter to another immigration officer, who recommended rescission. The district director approved the recommendation. That these specific facts played an important role in the Third Circuit's decision in *Quintana* is demonstrated by the language with which the Court enunciated its conclusion:

> "We think that something appearing to an officer's 'satisfaction' means that he must have something more than a hunch

Present regulations, however, have alleviated this threat. While prosecutorial duties are still delegated to the district director, the responsibility for deciding whether rescission is appropriate lies solely with an independent special inquiry officer.[13] If a district director tolls the running of the statute, he cannot prolong the proceedings indefinitely while his staff searches for evidence to support its suspicions. The special inquiry officer controls the pace of the rescission proceeding, much like a judge controls the pace of a lawsuit; he can, as a result, prevent any undue delay that would prejudice the rights of the alien whose adjustment of status is under challenge. *See* 8 C.F.R. Part 242, *especially* §§ 242.8(a) and 242.13.

In addition, we fear that construing § 246(a) to require that a hearing be held and a decision reached within the five-year period would encourage too hasty an adjudication of rescission cases. We fear that in proceedings commenced towards the end of the five-year period, special inquiry officers would be tempted to accelerate rescission proceedings so that a decision could be reached before expiration of the deadline—a

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about it, or even more than that he may be convinced in his own mind. We think it means a reasonable determination made in good faith after such investigation and hearing as is required. Here the Attorney General could have made no such determination by the end of the five-year period • • •. *As of that time the only investigation had concluded negatively and the Service was engaged in seeking further evidence with which to convince an inquiry officer that the plaintiff had improperly secured his status.*" 255 F. 2d at 164. [Emphasis added.]

[13]The independence of special inquiry officers in deciding the issues presented to them is illustrated by the officer's decision in this case and was conceded by Singh's counsel at oral argument before this Court.

practice that would hinder the ability of aliens whose adjustments of status are under challenge to respond to the Service's allegations. We believe, in short, that permitting service of a notice of intent to rescind to toll § 246(a) would serve the interests of aliens whose adjustments of status are challenged better than would the construction championed by Singh. The former construction should promote fair and impartial decisions reached after expeditious, but not hasty, adjudication. It should protect aliens from rushed proceedings conducted with an eye on the calendar; it should not, under the present regulations, promote the premature institution of rescission proceedings without substantial evidence.

Construing § 246(a) to permit the commencement of rescission proceedings to toll the statute of limitations, moreover, is in line with ordinary criminal and civil statutes of limitations, which provide that the filing of an indictment or of a civil complaint tolls the running of the statute.[14] Unlike § 246(a) the language of these statutes explicitly provides that commencement of an action shall suffice to toll the running of the statute of limitations. As discussed above, the actual language of § 246(a) affords no hint as to what Congress' intention was. These statutes are noteworthy, therefore, because the prevalence of limitations provisions that operate in this manner suggests the wisdom of construing § 246(a) to operate in a comparable manner—especially in light of the fact that the new

[14] *See, e.g.*, 18 U.S.C. § 3281 (prosecutions for capital offenses), § 3282 (prosecutions for noncapital offenses); 15 U.S.C. § 15(b) (private anti-trust suits).

regulations promulgated since *Quintana* prescribe formal rescission proceedings deliberately modeled after regular lawsuits. The present regulations explicitly provide, in fact, that "a proceeding shall be commenced by the service * * * of a notice of intent to rescind."[15]

Furthermore, the adoption of Singh's proposal would not even settle the issue of § 246(a)'s meaning. Singh's argument hinges on the words, "appear to the satisfaction of the Attorney General." The decision of a special inquiry officer, however, is not final, even within the Department of Justice; it may be appealed to the Board of Immigration Appeals. *See* 8 C.F.R. § 242.20. If we adopt Singh's construction of § 246(a) today, tomorrow another alien will certainly ask us to hold that even a special inquiry officer's decision does not satisfy the statutory requirement and that a decision by the Board of Immigration Appeals is neces-

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[15]Changes in the language of the regulations governing the commencement of rescission proceedings demonstrate how deliberate is the resemblance between rescission proceedings and regular lawsuits. The former regulation, 8 C. F. R. § 246.11, 19 F. R. 9179 (Dec. 24, 1954), made no mention of any proceeding at all. It provided in part,

> "If it appears to a district director that a person residing in his district was not in fact eligible for the adjustment of status made in his case, *he shall cause a notice to be served* on such person informing him of the grounds upon which it is intended to rescind the adjustment of status." [Emphasis added.]

The present regulation, 8 C. F. R. § 246.1, 28 F. R. 6737 (June 29, 1963), has a much more formal flavor. It provides, in part,

> "If it appears to a district director that a person residing in his district was not in fact eligible for the adjustment of status made in his case, *a proceeding shall be commenced by the service* upon such person of a notice of intention to rescind which shall inform him of the allegations upon which it is intended to rescind the adjustment of his status." [Emphasis added.]

sary. To hold that the Board must pass upon an alien's ineligibility within the prescribed five-year limitation period would be absurd in light of the prolonged litigation that is necessary before the Board can consider and decide a case. Yet the logic of Singh's argument would seem to compel that conclusion. We decline to construe § 246(a) in that way.

The decision of the District Court is reversed, and the matter is remanded to the Immigration and Naturalization Service for further proceedings consistent herewith.

Appendix B

United States Court of Appeals
For the Ninth Circuit

No. 26,512

Jiwan Singh,
Appellee-Plaintiff,
vs.
Immigration and Naturalization Service and Cecil W. Fullilove, District Director, Immigration and Naturalization Service, San Francisco District,
Appellant-Defendant.

Appeal from the United States District Court
for the Northern District of California

JUDGMENT

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed, and the matter is remanded to the Immigration and Naturalization Service for further proceedings.

Filed and entered February 24, 1972

Appendix C

United States Court of Appeals
For the Ninth Circuit

No. 26,512

Jiwan Singh,
Appellee-Plaintiff,
vs.
Immigration and Naturalization Service, et al.,
Appellant-Defendant.

[April 13, 1972]

Before: DUNIWAY and TRASK, Circuit Judges, and PREGERSON, District Judge

ORDER

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for an in banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

Appendix D

United States Court of Appeals
For the Ninth Circuit

No. 26,512

Jiwan Singh,
Appellee-Plaintiff,
vs.
Immigration and Naturalization Service,
Appellant-Defendant.

[April 26, 1972.]

ORDER STAYING ISSUANCE OF MANDATE

Upon application of Joseph S. Hertogs counsel for the Appellee, and good cause appearing, It Is Ordered that the issuance, under Rule 41(a) of the Federal Rules of Appellate Procedure, of the certified copy of the judgment of this Court in the above cause be and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the Appellee herein, provided such petition is filed in the Clerk's Office of the Supreme Court of the United States on or before May 13, 1972.

In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final

disposition of the case by the Supreme Court of the United States.

/s/ Harry Pregerson
United States Circuit Judge

Dated: San Francisco, Calif.
April 26, 1972.

Appendix E

United States Court of Appeals
For the Ninth Circuit

No. 26,512

Jiwan Singh,
Appellee-Plaintiff,

vs.

Immigration and Naturalization Service,
Appellant-Defendant.

[May 17, 1972]

ORDER STAYING ISSUANCE OF MANDATE

Upon application of Joseph S. Hertogs counsel for the Appellee, and good cause appearing, It Is Ordered that the issuance, under Rule 41 (a) of the Federal Rules of Appellate Procedure, of the certified copy of the judgment of this Court in the above cause be and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the Appellee herein, provided such petition is filed in the Clerk's Office of the Supreme Court of the United States on or before June 2, 1972.

In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final

disposition of the case by the Supreme Court of the United States.

/s/ Harry Pregerson
United States Circuit Judge.

Dated: San Francisco, Calif.
May 17, 1972.

Appendix F

In the United States District Court
Northern District of California

No. C-70 351 GBH

Jiwan Singh,
Plaintiff,
vs.
Immigration and Naturalization Service and Cecil W. Fullilove, District Director, Immigration and Naturalization Service, San Francisco District,
Defendant.

[May 27, 1970]

Joseph S. Hertogs
Jackson & Hertogs
580 Washington St
San Francisco, Calif 94111
Attorney for Plaintiff

James L. Browning, Jr
United States Attorney

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Chief Assistant United States Attorney
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San Francisco, Calif 94102
Attorneys for Defendant

MEMORANDUM OPINION GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff in his petition for review of administrative action and for declaratory judgment has recited the facts in this case concerning which there is no dispute. Defendant moves for summary judgment pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, there being only a matter of law at issue. Plaintiff has filed a cross-motion for summary judgment.

The sole question before the Court is whether the five-year limitation provision of Section 246(a) of the Immigration and Nationality Act (8 U.S.C. §1256[a])[1] (hereinafter referred to as the Act), was tolled when the plaintiff was served with a "Notice of Intention to Rescind Adjustment of Status Under Section 246 of the Immigration and Nationality Act" within the five-year period, although the hearings attendant upon said notice were not completed within the five-year period.

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[1]The limitation provision of Section 246(a) insofar as it relates to a rescission of an adjustment of status under Section 245 of the Act reads as follows:

> "• • • If, at any time within five years after the status of a person has been otherwise adjusted under the provisions of section 245 • • • of this Act or any other provision of law to that of an alien lawfully admitted for permanent residence, it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible for such adjustment of status, the Attorney General shall rescind the action taken granting an adjustment of status to such person and cancelling deportation in the case of such person if that occurred and the person shall thereupon be subject to all provisions of this Act to the same extent as if the adjustment of status had not been made."

The relevant dates and undisputed facts are as follows:

Plaintiff was first admitted to the United States as a non-immigrant student on January 10, 1959. His status was subsequently adjusted to that of a lawful permanent resident of the United States under Section 245 of the Immigration and Nationality Act (8 U.S.C. §1255) on October 18, 1963.

On September 12, 1968, the District Director of the Immigration and Naturalization Service mailed a "Notice of Intention to Rescind Adjustment of Status" under Section 246 of the Act. This Notice was received by the plaintiff on September 19, 1968, within the five-year limitation period prescribed by the Act.

By letter of October 11, 1968, within the five-year period, the plaintiff requested a hearing before the Special Inquiry Officer. On December 6, 1968, after a hearing, and after the five-year limitation period, the Special Inquiry Officer ordered the rescission proceedings terminated on the ground that the action was barred by the statute of limitations.

On December 19, 1969, the Board of Immigration Appeals held that the five-year limitation provision of Section 246 was tolled when the "Notice of Intention to Rescind Adjustment of Status" was issued, and ordered that the Special Inquiry Officer's decision terminating the proceedings be withdrawn.

The Court is asked to review the decision of the Board.

The Special Inquiry Officer was of the opinion that the statutory language required " * * * action within

a prescribed period of five years, not the mere possibility of action," and that the statute was not tolled by the mere filing of notice. In so doing, he subscribed to the interpretation given to the Act by the Court in ***Quintana v. Holland,*** 255 F.2d 161, 164 (3rd Cir. 1958):

> "We take a different view of this statute than that of the district court in this case and Government's counsel in support of the court's ruling. That which is accomplished by a rescission of status is pretty harsh. It is comparable to the revocation of citizenship about which the courts have been very keen to make sure that the individual received careful protection. The rescission blocks the man on the road to citizenship, and results in banishment from a country where he may have lived a long time, as in this case. We think, therefore, that Congress meant to require the Attorney General to take the described action within five years and to be bound by that limitation itself.
>
> What is the described action the Attorney General must take? In our opinion the giving of notice within the five-year period is not enough. The statute uses the words 'it shall appear to the satisfaction of the Attorney General' and so forth. *We think that something appearing to an officer's 'satisfaction' means that he must have something more than a hunch about it, or even more than that he may be convinced in his own mind. We think it means a reasonable determination made in good faith after such investigation and hearing as is required.*" (Italics ours)

No valid reason appears for departing from the well-reasoned rule of that case. The express language

of the Act requires that the Attorney General be satisfied that plaintiff was not, in fact, entitled to the adjustment of status within the five-year period. A reasonable determination made in good faith after investigation and hearing is obviously required. Otherwise, the proceedings could continue on interminably without an effective statute of limitations on which the immigrant may rely.

Thus it appears that it was impossible for the Service to afford plaintiff herein a hearing within the contemplation of the Act, according him not only an opportunity to be heard, but as well, to cross-examine witnesses and to produce evidence within the period of time prescribed by the Act.

Accordingly, plaintiff's motion is Granted and defendants' motion Denied.

Dated: May 27, 1970.

George B. Harris
United States District Judge

Appendix G

In the United States District Court
Northern District of California

No. C-70 351 GBH

Jiwan Singh,
Plaintiff,
vs.
Immigration and Naturalization Service and Cecil W. Fullilove, District Director, Immigration and Naturalization Service, San Francisco District,
Defendant.

[August 3, 1970]

ORDER AND JUDGMENT

This cause having come on to be heard on the motion of defendant for summary judgment and the cross-motion of plaintiff for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the Court having considered the pleadings in the action, the certified administrative file, and having heard the argument of counsel, and heretofore on May 27, 1970 filed its Memorandum Opinion granting plaintiff's motion for summary judgment, it is

Ordered, that defendant's motion for summary judgment be and the same is hereby in all respects denied, and it is further

Ordered, that the administrative record is remanded to the defendant for further action in accordance with the Memorandum Opinion of this Court filed on May 27, 1970.

George B. Harris
United States District Judge

Appendix H

In the United States District Court
Northern District of California

No. C-70 351 GBH

Jiwan Singh,
Petitioner,
vs.
Immigration and Naturalization Service and Cecil W. Fullilove, District Director, Immigration and Naturalization Service, San Francisco District,
Respondent.

[February 16, 1970]

PETITION FOR REVIEW OF ADMINISTRATIVE ACTION AND FOR DECLARATORY JUDGMENT

Petitioner respectfully alleges:

I

This is an action for a declaratory judgment under the Declaratory Judgment Act (28 USC 2201) and for review under the Administrative Procedures Act (5 USC 1001, et seq.).

II

Petitioner is an alien, a native and citizen of India.

III

Petitioner was first admitted to the United States at the Port of New York, New York on January 10, 1959, as a nonimmigrant student, and he has been a resident of the United States continuously since that date

IV

Petitioner's status was adjusted to that of a lawful permanent resident of the United States under Section 245 of the Immigration and Nationality Act on October 18, 1963.

V

On September 12, 1968, the District Director, Immigration and Naturalization Service, San Francisco, mailed to petitioner with a covering letter a "Notice to Rescind Adjustment of Status under Section 246 of the Immigration and Nationality Act", stating that petitioner had thirty days from the date of receipt of the notice to answer the charges contained therein. The notice and covering letter were received by petitioner on September 19, 1968. In a letter dated October 11, 1968, petitioner requested a hearing before a Special Inquiry Officer on the charges contained in the notice.

VI

In a decision dated December 6, 1968, the Special Inquiry Officer entered an order terminating the pro-

ceedings on the ground that the action sought by respondent was barred by the statute of limitations.

VII

In a decision dated December 19, 1969, the Board of Immigration Appeals concluded that the five-year limitation provision of Section 246 of the Act is tolled when the notice to rescind is issued. It was then ordered that the decision of the Special Inquiry Officer terminating the proceedings be withdrawn.

VIII

The order of the Board of Immigration Appeals, dated December 19, 1969, is a final administrative order insofar as the legal issues herein are concerned.

IX

That the order of the Board of Immigration Appeals, dated December 19, 1969, is illegal and void, is contrary to law; that said action is barred by the statute of limitations set forth in Section 246 of the Immigration and Nationality Act of 1952.

Wherefore, petitioner prays for judgment ordering termination of the administrative proceedings by the Immigration and Naturalization Service.

Dated: February 13, 1970.

Joseph S. Hertogs
Attorney for Petitioner

Appendix I

United States Department of Justice
Board of Immigration Appeals

[December 19, 1969]

File: A11 430 285 - San Francisco

In re: Jiwan Singh

In Rescission Proceedings

Appeal

Oral Argument: February 18, 1969

On behalf of respondent:

Joseph S. Hertogs, Esq.
580 Washington Street
San Francisco,
Calif. 94111

On behalf of I&N Service:

Irving A. Appleman
Appellate Trial
Attorney
Stephen M. Suffin
Trial Attorney
(Brief filed)

Rescission Grounds:

Marriage not valid for nonquota status, and quota visa not available

Application:

Withdrawal of order terminating the proceeding and remand to special inquiry officer for hearing on the merits

The above-captioned case concerns an interpretation of the five-year limitation provision of section 246(a) of the Immigration and Nationality Act (8 U.S.C. 1256(a))[1] insofar as it relates to the rescission of an adjustment of a nonimmigrant alien's immigration status to that of a permanent resident alien. The special inquiry officer, on December 6, 1968, concluded that it is impossible to enter an order of rescission "at any time within five years after the status of (the respondent) has been adjusted" under section 245 and terminated the proceeding. He relies upon *Quintana v. Holland,* 255 F.2d 161 (3 Cir. 1958). The trial attorney appeals on the ground that service of a "Notice of Intention to Rescind" within the five-year period is sufficient to toll the running of the statute.

The respondent is a native and citizen of India who was admitted to the United States at the port of New York on January 10, 1959 as a nonimmigrant student. He married a United States citizen at Reno, Nevada on July 24, 1963. An application for permanent residence status was granted on October 18, 1963. The

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[1]The limitation provision of section 246(a) insofar as it relates to a rescission of an adjustment of status under section 245 of the Act reads as follows:

> If, at any time within five years after the status of a person has been otherwise adjusted under the provisions of section 245 . . . of this Act or any other provision of law to that of an alien lawfully admitted for permanent residence, it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible for such adjustment of status, the Attorney General shall rescind the action taken granting an adjustment of status to such person and cancelling deportation in the case of such person if that occurred and the person shall thereupon be subject to all provisions of this Act to the same extent as if the adjustment of status had not been made.

notice of intention to rescind charges that the respondent's marriage to a United States citizen was entered into solely for the purpose of enabling him to acquire the status of a permanent resident of the United States because he never cohabited in a husband and wife relationship with his citizen wife.

The notice of intention to rescind was mailed to the respondent on September 12, 1968 by "certified mail—return receipt requested" (Ex. 1). The return receipt shows that it was received by the respondent on September 19, 1968. Counsel by letter dated October 11, 1968 requested a hearing before a special inquiry officer. The hearing was held on December 6, 1968, during the course of which, counsel moved for termination of the proceeding on the ground that the preceeding is not in accord with "precedent decisions of the Board of Immigration Appeals and the Service" since "more than five years elapsed from the granting of permanent resident status on October 18, 1963, and the date of any entry of any decision in connection with the rescission proceeding" (p. 3).

Counsel in his brief on appeal relies upon *Quintana v. Holland,* 255 F.2d 161 (3 Cir. 1958), the Assistant Commissioner's decision in *Matter of T-,* 8 I&N Dec. 96 (1958), and an unreported decision by this Board *in Matter of Ettlinger,* A12 548 706 (1966 and 1968). One of the issues presented in *Matter of T-* was whether appellate rights preserved for the alien under 8 C.F.R. 246 prevented final disposition of the case within the five-year period of limitation provided by the statute. The Assistant Commissioner ruled that

since the alien's application for adjustment of status was granted on June 11, 1953, the entry of an order of rescission by the District Director on June 3, 1958 tolled the five-year period of limitation provided by the statute notwithstanding that the appellate rights to which the alien was entitled have prevented final disposition of the case within the five years.[2]

A similar issue was before us in *Matter of Ettlinger* (supra). Ettlinger's status was adjusted on October 6, 1961 and the special inquiry officer's order of rescission was entered on August 17, 1966, within the five-year period of limitation. We noted in our opinion of December 1, 1966 that the case of *Quintana v. Holland* is distinguishable. The case was again before us in deportation proceedings on February 7, 1968. We remanded in order to have the special inquiry officer reconsider the evidence in light of the burden of proof of clear, unequivocal and convincing evidence pursuant to the *Waziri* decision of the Ninth Circuit (392 F.2d 55, 1968) and the *Rodrigues* decision of the Third Circuit (389 F.2d 129, 1968). We said in our opinion, "Reconsideration for the purpose of applying this burden of proof does not affect our prior holding that the rescission order of the special inquiry officer on August 17, 1966 was timely, and that thereafter the statute of limitations in section 246 was tolled."

We find little support for either counsel's position or that of the special inquiry officer in *Matter of T-*, or

[2] *Quintana v. Holland* (supra) was decided on May 23, 1958 and the Assistant Commissioner made no reference to the decision of the Third Circuit Court of Appeals in his decision of July 31, 1958.

Ettlinger, because in those cases the issue was whether appellate rights when exercised granted the alien an immunity if the appellate proceeding was not completed within the five-year period of limitation. In this case we are concerned with whether the service of a notice to rescind or the date of the decision of the special inquiry officer tolls the running of the statute.

The Court of Appeals in *Quintana v. Holland* (supra) had before it a case involving the rescission of suspension of deportation on the ground that the alien's membership in the Communist Party made him ineligible therefor. Quintana's deportation was suspended by the Immigration Service on December 3, 1947, and reported to the Congress on December 15, 1947. He paid the fee on July 22, 1948, and on July 6, 1949 a congressional resolution approved suspension of deportation. The District Director notified Quintana on July 9, 1953 of his intention to rescind the grant of suspension of deportation. Following hearings in 1954 and 1955, the District Director on March 30, 1955 approved a recommendation for rescission of suspension of deportation. The Acting Regional Commissioner approved on April 11, 1955. Congress on April 9, 1956 passed a concurrent resolution withdrawing suspension of deportation.

The Government took the position that the rescission proceedings were timely because Quintana was notified of the intention to rescind within five years of the date he paid his fee for suspension of deportation on July 22, 1948. The Government also argued that suspension of deportation is a "matter of legis-

lative grace within a field of congressional supremacy the disposition of which Congress had reserved for itself," and the courts cannot either review or overrule an action taken by Congress.

The court stated in effect that the Government's argument was not based on a sound or valid premise. It stated, "we think . . . that Congress meant to require the Attorney General to take the described action within five years and to be bound by that limitation itself . . . The giving of notice within the five-year period is not enough . . ." Referring to the phrase used in the statute "it shall appear to the satisfaction of the Attorney General," the court interpreted this as meaning that the Attorney General must make a "reasonable determination . . . in good faith after such investigation and hearing as is required." The court stated that "the Attorney General could have made no such determination by the end of the five-year period from the latest possible date that can be considered" (255 F.2d 164).

We do not agree with the court's interpretation of the limitation provisions of section 246. The ruling of a reviewing court in one circuit is not necessarily dispositive of the issue; a conflicting view may be expressed by a court in another circuit. See e.g. *Errico v. INS*, 349 F.2d 541 (9 Cir. 1965) and *Scott v. INS*, 350 F.2d 894 (2 Cir. 1965). Similarly the Government's failure to appeal from a court's adverse decision does not of itself indicate acquiescence. The determination not to appeal may be based on other considerations, such as the inadequacy of the record

as a vehicle for appeal or factors outside of the record which render an appeal undesirable. Cf. *Matter of Lim,* Interim Decision 1947 (BIA 1969).

There was conflict between the circuits with regard to the limitation provisions found in section 19(a) of the 1917 Act.[3] The Third Circuit in the case of *Hughes v. Tropello,* 296 F. 306 (1924) and *McCandless v. U.S. ex rel. Swystun,* 33 F.2d 882 (1929), construed the phrase "at any time within [five or three] years after entry" as "words of limitation." The court said that in order to give effect to them "the warrant of deportation and not merely the warrant of arrest" must be issued within the statutory period and if not "the power of deportation is exhausted" (33 F.2d 883)

The majority of the Circuit Courts of Appeal did not adhere to the interpretation of the "words of limitation" enunciated by the Third Circuit. The most recent case is that of *Miller v. U.S. ex rel. Bunt,* 181 F.2d 363 (5 Cir. 1950). The question before the court was whether a timely issued warrant of arrest, as distinguished from a warrant of deportation, served to toll the running of the limitation provision as set forth in section 19(a) of the 1917 Act. The court referred to the fact that there was a diversity of opinion prevailing between several of the circuits and the Third Circuit. The court ruled that a timely issuance of the warrant of arrest suffices and in support of its position said:

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[3]Section 19(a) of the 1917 Act limited the deportability of certain designated aliens to "at any time within (five or three) years after entry."

> This position is warranted by the express phraseology of the statute and is rendered persuasive by consideration of the universal rule prevailing in the various states and federal courts[4], that the filing of charges, whether by information or by indictment, tolls the running of the statute of limitations against a criminal prosecution and is effective even though the warrant be not served upon the accused until after the running of the statute.

We find no basis for applying a different rule with regard to the limitation provision of section 246. The function served by any statute of limitation is to give the accused notice of the assertion of a claim against him before it has become stale, in order that he may be duly warned to preserve his evidence if he wishes to contest the asserted claim. *D'Onofrio Construction Company v. Recon Company,* 255 F.2d 904, 908 (1 Cir. 1958). The Attorney General has said: "The effect of the five-year limitation on rescission is simply to bar the Attorney General from returning an alien with adjusted status [under section 245] to the category of a nonimmigrant." *Matter of S-,* 9 I&N Dec. 547, 554 (A.G. 1962).

Here the respondent seeks to bar the rescission of his adjusted status by claiming immunity under the

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[4]The court cited in support of its position the following immigration cases: *U.S. ex rel. David v. Tod,* 289 F. 60 (2 Cir. 1923); *U.S. ex rel. Patton v. Tod,* 297 F. 385 (2 Cir. 1924); *U.S. ex rel. Danikas v. Day,* 20 F.2d 733 (2 Cir. 1927); *U.S. ex rel. Ginal v. Day,* 22 F.2d 1022 (2 Cir. 1927); *Metaxis v. Weedin,* 44 F.2d 539 (9 Cir. 1930); *Marty v. Nagle,* 44 F.2d 695 (9 Cir. 1930); *Tillinghast v. Cresswell ex rel. Di Pierro,* 54 F.2d 459 (1 Cir. 1931); *Raftery ex rel. Giacomazzi v. Tillinghast,* 63 F.2d 97 (1 Cir. 1933); *Bun Chew v. Connell,* 233 F. 220 (9 Cir. 1916).

five-year limitation provided by section 246. The Supreme Court has said that where one resorts to a statute of limitations in order "to bar the rights of Government," such statute "must receive a strict construction in favor of the Government." *E. I. Dupont De Nemours and Company v. Davis,* 264 U.S. 456, 462, 68 L. Ed. 789, 791 (1924). If rescission proceedings must be concluded and not merely begun within the five-year period, the immigration authorities to whom the Attorney General has delegated his authority would of necessity in some cases be constrained to hasty and otherwise drastic procedure in order to avoid failure in their duty to obey the statute. Cf. *Nocchi v. Johnson,* 6 F. 2d 1 (1 Cir. 1925). The Third Circuit's interpretation of the limitation provision of section 246 as stated in *Quintana* places a premium on the use of any and all means to delay a decision by the special inquiry officer. We cannot believe that the Congress intended that the power and authority to rescind would cease merely because the time accorded to the alien in which to have his day in court had run beyond five years, notwithstanding the fact that the notice to rescind had been served upon him within the five-year period of limitation. Cf. *U.S. ex rel. Patton v. Tod,* 297 F. 385, 397 (2 Cir. 1924). The statute must be given a fair and reasonable interpretation in order to effectuate its purpose, namely, to prevent undue delay in the bringing of actions, *Missouri, K. and T. R. Company v. Harriman Brothers,* 227 U.S. 657, 57 L. Ed. 690 (1913).

The notice of intention to rescind (Ex. 1), served upon the respondent by registered mail within the five-year period of limitation, fully sets forth the essential facts for commencement of rescission proceedings under section 246 of the Immigration and Nationality Act. Furthermore, it appears from a reading of the notice to rescind that there was probable cause for believing that the respondent had obtained his adjustment of status unlawfully. It has been held that where the foregoing factors are clearly set forth in a complaint served upon the accused, the service of the complaint tolls the running of the statute of limitations, *Jaben v. United States,* 333 F.2d 535 (8 Cir. 1964), aff'd 381 U.S. 214, 14 L. Ed. 2d 345 (1965).

Contrary to the rationale applied by the Third Circuit in *Quintana,* we find nothing in the statute which says *when* the Attorney General must make "a reasonable determination . . . in good faith . . . after . . . investigation and hearing . . ." (255 F.2d 165).[5] In fact, a reading of the notice to rescind in the case before us makes it clear that the immigration officers to whom the Attorney General has delegated his authority had made "a reasonable determination . . . in good faith . . . after investigation . . . because otherwise the notice to rescind would not have been served

[5]It appears that the reasoning of the court with regard to whether the limitation provision of the statute had been met was influenced by the fact that at the time the notice to rescind suspension of deportation was served upon *Quintana,* the investigation with regard to his membership in the Communist Party had concluded negatively and the Service was then engaged in seeking further evidence with which to convince the special inquiry officer that Quintana had been a member of the Communist Party (see 255 F.2d 165). This factor is not present in the case before us.

upon the respondent. All that remained was the hearing provided by 8 C.F.R. 246.5 which affords the alien an opportunity to rebut the allegations set forth in the notice to rescind. The allegations by their very nature are notice to the respondent that the Attorney General is not satisfied that he "was . . . in fact eligible for such adjustment of status."

We conclude on the basis of the foregoing that the five-year limitation provision of section 246 of the Act is tolled when the notice to rescind is issued by the District Director in accordance with 8 C.F.R. 246.1. The decision and order of the special inquiry officer will be reversed and the case remanded for further proceedings in conformity with this opinion.

Order: It is ordered that the order entered by the special inquiry officer on December 6, 1968 terminating this proceeding be and the same is hereby withdrawn.

It Is Further Ordered that the case be remanded to the special inquiry officer for further proceedings in conformity with the foregoing opinion.

Chairman

Appendix J

United States Department of Justice
Immigration and Naturalization Service

December 6, 1968

File: A11 430 285—San Francisco, California

In the Matter of
Jiwah Singh
Respondent.

IN RESCISSION PROCEEDINGS

Rescission grounds:

Marriage not valid for nonquota status, and quota visa not available

In behalf of respondent:
Jackson & Hertogs
580 Washington Street
San Francisco, Calif. 94111

Joseph S. Hertogs, Esq.
of counsel
In behalf of service:
Jay Segal, Esq.
Trial Attorney
San Francisco, California

DECISION OF THE
SPECIAL INQUIRY OFFICER

This is a proceeding under Section 246 of the Immigration and Nationality Act to rescind the adjustment of the respondent's immigration status on October 18,

1963, to that of an alien lawfully admitted for permanent residence under Section 245.[1] The proceeding was commenced sometime from September 12, 1968, through September 18, 1968.[2]

At the beginning of the hearing today, December 6, 1968, counsel for the respondent moved for termination of the proceeding on the ground that it was no longer possible for the Attorney General to comply with the five-year limitation imposed upon him by

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[1]Section 246 provides: "(a) If, at any time within five years after the status of a person has been adjusted under the provisions of section 244 of this Act or under section 19(c) of the Immigration Act of February 5, 1917, to that of an alien lawfully admitted for permanent residence, it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible for such adjustment of status, the Attorney General shall submit to the Congress a complete and detailed statement of the facts and pertinent provisions of law in the case. Such reports shall be submitted on the first and fifteenth day of each calendar month in which Congress is in session. If during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, the Congress passes a concurrent resolution withdrawing suspension of deportation, the person shall thereupon be subject to all provisions of this Act to the same extent as if the adjustment of status had not been made. If, at any time within five years after the status of a person has been otherwise adjusted under the provisions of section 245 or 249 of this Act or any other provision of law to that of an alien lawfully admitted for permanent residence, it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible for such adjustment of status, the Attorney General shall rescind the action taken granting an adjustment of status to such person and canceling deportation in the case of such person if that occurred and the person shall thereupon be subject to all provisions of this Act to the same extent as if the adjustment of status had not been made."

[2]A rescission proceeding is commenced by service of a notice of intention to rescind. 8 CFR 246.1. Service by mail is completed upon mailing. 8 CFR 242.1(c). Here there is no direct evidence of the date of mailing. The notice and covering letter were dated September 12, 1968. (Exh. 1) According to the return receipt, the notice was received on September 19, 1968. It follows that the notice must have been mailed sometime from September 12, 1968, through September 18, 1968.

section 246. He contended that section 246 required that a final decision be entered within five years of the grant of status, citing *Quintana v. Holland,* 255 F. 2d 161 (1958), *Matter of T-,* 8 I. & N. Dec. 96, A.C. 7-31-58, and *Matter of Ettlinger,* A12 548 706—San Francisco, BIA 12-1-66, and 2-7-68, unreported. It had been impossible, he pointed out, to hold a hearing in this case within five years after October 18, 1963, if the respondent was to have had the 30 days from the date of receipt of the notice specified in the forwarding letter within which to answer the allegations in the Notice and to request a hearing before a special inquiry, for the Notice had not been received by the respondent till September 19, 1968.

The Trial Attorney answered that the five-year limitation in section 246 ran from the date of adjustment to the date of service of the notice of intention to rescind, and that to hold otherwise distorted the purpose of the statute. As the District Director could have rescinded the respondent's permanent resident status within five years from the grant thereof had the allegations in the notice of intention to rescind been admitted or if no answer had been made, the running of the five-year period had been tolled. *Quintana* and *Matter of T-* were distinguishable from the instant case, the former because no order could have been entered within five years after adjustment, the latter because an order had been entered within five years after adjustment. The purpose of a statute of limitations as a general principle was to permit the proponent to bring an action within the full time specified in the statute.

Counsel for the respondent replied that the provision of section 246 that if at any time within five years after an adjustment of status it should appear to the satisfaction of the Attorney General that the person adjusted was not in fact eligible for such adjustment the Attorney General should rescind the action taken granting the adjustment meant a decision after hearing.

I know of no statute of limitations which has been interpreted to mean other than that the running of the time limitation thereof was tolled by commencement of an action within the time limitation. Thus, if the five-year limitation in section 246 is properly called a statute of limitations, the construction contended for by counsel for the respondent would give us a statute of limitations entirely different from what is ordinarily regarded as a statute of limitations. The name by which the five-year limitation of section 246 is called, however, is immaterial. We are bound by the language of the statute as it was written and as it has been interpreted by the Courts and the Board of Immigration Appeals, not by what we think the language of the statute should have been or how we wish it should be interpreted. Thus, the Trial Attorney's argument that the section 246 time limitation should be applied as are statutes of limitations generally, is without merit.

Section 246 deals with rescission of various kinds of adjustments of status to that of an alien lawfully admitted for permanent residence. Rescission of sus-

pension of deportation is covered in the first part consisting of three sentences. Rescission of adjustment under sections 245 and 249 of the Act or any other provision of law is covered in the second part consisting of one sentence. Both parts contain the following language:

> *"If, at any time within five years after* the status of a person has been adjusted . . . to that of an alien lawfully admitted for permanent residence, *it shall appear to the satisfaction of the Attorney General* that the person was not in fact eligible for such adjustment of status, the Attorney General shall . . . ." (Emphasis added.)

Quintana v. Holland, supra, which interpreted the first part, held that the italicized language meant "a reasonable determination made in good faith after such investigation and hearing as is required," that is, the Attorney General must have something more than a hunch about it, and must be more than convinced in his own mind. Thus, the Court ruled out the possibility that service of the notice of intention to rescind tolled the running of the five-year period.

Here, five years from October 18, 1963, the date on which the respondent was granted permanent resident status under section 245, were completed on October 18, 1968. His request for hearing before a special inquiry officer, dated October 11, 1968, was received by the Service on October 18, 1968. By submitting his request for hearing on October 18th, the respondent complied with the instructions given him in the Service letter under cover of which the notice of intention

to rescind had been served on him.[3] Although the letter did not follow 8 CFR 246.1, which provided that the notice should inform the respondent he might submit within 30 days from the date of service of the notice an answer in writing and might request within such period a hearing before a special inquiry officer, in all fairness to the respondent the language of the letter must control. As he had been granted permanent resident status on October 18, 1963, it was impossible to hold the hearing required by 8 CFR 246 in time for the Attorney General to have been "satisfied," as that term has been interpreted by the Court of Appeals for the Third Circuit, within five years after the respondent's status had been adjusted. That the District Director could have rescinded the grant of the respondent's permanent resident status within five years therefrom had the allegations in the notice of intention to rescind been admitted or if no answer had been received, as contended by the Trial Attorney, is of no consequence. Section 246 requires action within a prescribed period of five years, not the mere possibility of action.

Neither *Matter of T-, supra,* nor *Matter of Ettlinger, supra,* adopted the interpretation of section 246 advocated by the Trial Attorney. The Assistant Commissioner who decided *Matter of T-,* and the Board which decided *Matter of Ettlinger* selected respectively

[3] The letter contains the following:
"You may submit, within thirty (30) days from the date of receipt of this notice, an answer in writing, under oath, setting forth the reasons why your permanent resident status should not be rescinded. You may also request within thirty (30) days from receipt of this notice, a hearing before a special inquiry officer in support of, or in lieu of, a written answer."

the entry of the district director's and of the special inquiry officer's decisions as the act which tolled the running of the section 246 time limitation.[4] Here, of course, there is no longer possible a special inquiry officer's decision within five years after the grant to the respondent of his permanent resident status. The matter cannot, however, be treated as one of first impression, which the Trial Attorney has in effect requested, simply because in *Matter of T-* the district director's decision and in *Ettlinger* the special inquiry officer's decision had been rendered within five years after the adjustment, whereas here there can be no such decision within the five-year period. Furthermore, in *Quintana* as here the rescission proceeding was commenced within five years after the alien's status had been adjusted, although a decision could not be made within that period. I perceive no sound basis for interpreting the time limitation in the second part of section 246 differently from the time limitation in the first part, which was dealt with in *Quintana,* especially as the language in both parts is identical.

Accordingly, as it is now impossible for entry of an order of rescission even by a special inquiry officer within five years after the adjustment of the respondent's status, the proceeding must be terminated.

It Is Ordered that the proceeding in this case be terminated.

Monroe Kroll
Special Inquiry Officer

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[4]On July 31, 1958, when *Matter of T-* was decided, the district director was the official to whom the Attorney General had delegated his authority under section 246.

Appendix K

Please Refer to This File Number
A11 430 285 (M-4)

United States Department of Justice
Immigration and Naturalization Service
San Francisco, California 94111

September 12, 1968

Certified Mail—
Return Receipt Requested

Mr. Jiwan Singh
2710 Haste Street
Berkeley, California

Dear Sir:

You are hereby notified that this Service intends to rescind the permanent resident status accorded you under section 245 of the Immigration and Nationality Act at Sacramento, California on October 18, 1963, on the ground that you were ineligible for such adjustment. Attached hereto are the allegations upon the basis of which it is proposed to rescind your permanent resident status.

You may submit, within thirty (30) days from the date of receipt of this notice, an answer in writing, under oath, setting forth the reasons why your permanent resident status should not be rescinded. You may also request, within thirty (30) days from receipt of this notice, a hearing before a special inquiry officer in support of, or in lieu of, a written answer.

This hearing would be held in San Francisco, California. You may have the assistance of, or be represented by, counsel or a representative of your choice, qualified under Title 8, Code of Federal Regulations, Part 292, without expense to the Government, in preparation of your answer or in connection with the hearing.

If your answer admits the allegations contained in the notice of intention to rescind, or if no answer is filed within the 30-day period, or if no hearing is requested within such period, the permanent resident status previously accorded you will be rescinded, and no appeal shall lie from such rescission.

Sincerely,

/s/ E. A. McFadden

E. A. McFadden

Acting District Director

Attachment

cc: Joseph S. Hertogs, Esq.
580 Washington Street
San Francisco, California

United States Department of Justice
Immigration and Naturalization Service

File No. A11 430-285

San Francisco, California

NOTICE OF INTENTION TO RESCIND ADJUSTMENT OF STATUS UNDER SECTION 246 OF THE IMMIGRATION AND NATIONALITY ACT

United States of America
In the Matter of
Jiwan Singh,
Respondent

To: Jiwan Singh
2710 Haste Street
Berkeley, California

Upon inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

1. You are not a citizen or national of the United States;
2. You are a native and citizen of India;
3. You entered the United States at New York, New York on January 10, 1959, as a nonimmigrant student;

4. On July 24, 1963, at Reno, Nevada you were married to Margrette Joan Lane, nee Hargis;

5. On September 23, 1963, you were accorded status under section 101(a)(27)(A) of the Immigration and Nationality Act, as the spouse of a United States citizen, upon the basis of a petition filed by Margrette Joan Singh, formerly Lane, nee Hargis;

6. On August 26, 1963, you filed with the Immigration and Naturalization Service an application to adjust your status to that of a permanent resident of the United States pursuant to section 245 of the Immigration and Nationality Act;

7. On October 18, 1963, your application for permanent resident status under section 245 of the Immigration and Nationality Act was granted;

8. Your marriage to Margrette Joan Singh, formerly Lane, nee Hargis, was entered into solely for the purpose of enabling you to acquire the status of a permanent resident of the United States;

9. You never cohabited with Margrette Joan Singh in a husband and wife relationship;

10. On October 18, 1963, a quota immigrant visa under the quota for India was not immediately available to you.

On The Basis Of The Foregoing Allegations, it is charged that the status of a permanent resident of the United States accorded to you on October 18, 1963, pursuant to section 245 of the Immigration and

Nationality Act, is subject to rescission under section 246 of that Act on the following ground:

> Your marriage to Margrette Joan Singh, formerly Lane, nee Hargis, was not valid for the purpose of according you nonquota status as the spouse of a United States citizen under section 101(a)(27)(A) of the Act and a visa under the quota for India was not available to you.

/s/ E. A. McFadden
E. A. McFadden
Acting District Director
San Francisco, California

Dated: September 12, 1968

Appendix L

TITLE 8, U.S.C.A., CHAPTER 1

PART 246—RESCISSION OF ADJUSTMENT OF STATUS

Sec.

246.1 Notice.

246.2 Allegations admitted; no answer filed, no hearing requested.

246.3 Allegations contested or denied: hearing requested.

246.4 Special inquiry officer's authority; withdrawal and substitution.

246.5 Hearing.

246.6 Decision and order.

246.7 Appeals.

246.8 Reopening or reconsideration.

246.9 Surrender of Form I-151.

AUTHORITY: The provisions of this Part 246 issued under secs. 103, 244, 245, 246, 249, 66 Stat. 173, 214, 217, 219; 8 U.S.C. 1103, 1254, as amended, 1255, as amended, 1256, 1259, as amended.

SOURCE: The provisions of this Part 246 appear at 27 F.R. 10789, Nov. 6, 1962, unless otherwise noted.

§ 246.1 *Notice.*

If it appears to a district director that a person residing in his district was not in fact eligible for the adjustment of status made in his case, a proceeding

shall be commenced by the service upon such person of a notice of intention to rescind which shall inform him of the allegations upon which it is intended to rescind the adjustment of his status. In such a proceeding the person shall be known as the respondent. The notice shall also inform the respondent that he may submit, within thirty days from the date of service of the notice, an answer in writing under oath setting forth reasons why such rescission shall not be made, and that he may, within such period, request a hearing before a special inquiry officer in support of, or in lieu of his written answer. The respondent shall further be informed that he may have the assistance of or be represented by counsel or representative of his choice qualified under Part 292 of this chapter, without expense to the Government, in the preparation of his answer or in connection with his hearing, and that he may present such evidence in his behalf as may be relevant to the rescission.

[28 F.R. 6737, June 29, 1963]

§ 246.2 *Allegations admitted; no answer filed; no hearing requested.*

If the answer admits all the allegations in the notice, or if no answer is filed within the thirty-day period, or if no hearing is requested within such period, and the status of that of a permanent resident was acquired through suspension of deportation under section 19(c) of the Immigration Act of February 5, 1917, or under section 244 of the Immigration and

Nationality Act, the district director shall forward the respondent's file containing a copy of the notice and the answer, if any, to the regional commissioner for further action in accordance with section 246 of the Immigration and Nationality Act. If the answer admits the allegations in the notice, or if no answer is filed within the thirty-day period, or if no hearing is requested within such period, and the status of that of a permanent resident was acquired through adjustment of status under section 245 or 249 of the Immigration and Nationality Act, the district director shall rescind the adjustment of status previously granted, and no appeal shall lie from his decision.

§ 246.3 *Allegations contested or denied; hearing requested.*

If, within the prescribed time following service of the notice pursuant to § 246.1, the respondent has filed an answer which contests or denies any allegation in the notice, or a hearing is requested, a hearing pursuant to § 246.5 shall be conducted by a special inquiry officer and the procedures specified in §§ 242.10, 242.11, 242.12, 242.13, 242.14(c), (d), and (e), and 242.15 of this chapter shall apply.

[29 F.R. 13243, Sept. 24, 1964]

§ 246.4 *Special inquiry officer's authority; withdrawal and substitution.*

In any proceeding conducted under this part, the special inquiry officer shall have authority to interro-

gate, examine, and cross-examine the respondent and other witnesses, to present and receive evidence, to determine whether adjustment of status shall be rescinded, to make decisions thereon, including an appropriate order, and to take any other action consistent with applicable provisions of law and regulations as may be appropriate to the disposition of the case. Nothing contained in this part shall be construed to diminish the authority conferred on special inquiry officers by the Act. The special inquiry officer assigned to conduct a hearing shall, at any time, withdraw if he deems himself disqualified. If a hearing has begun but no evidence has been adduced other than the notice and answer, if any, pursuant to §§ 246.1 and 246.2, or if a special inquiry officer becomes unavailable to complete his duties within a reasonable time, or if at any time the respondent consents to a substitution, another special inquiry officer may be assigned to complete the case. The new special inquiry officer shall familiarize himself with the record in the case and shall state for the record that he has done so.

§ 246.5 *Hearing.*

(a) *Trial attorney.* The Government shall be represented at the hearing by a trial attorney who shall have authority to present evidence, and to interrogate, examine, and cross-examine the respondent and other witnesses. The trial attorney is authorized to appeal from a decision of the special inquiry officer pursuant to § 246.7 and to move for reopening or reconsideration pursuant to § 246.8.

(b) *Opening.* The special inquiry officer shall advise the respondent of the nature of the proceeding and the legal authority under which it is conducted; advise the respondent of his right to representation, at no expense to the Government, by counsel of his own choice qualified under Part 292 of this chapter and require him to state then and there whether he desires representation; advise the respondent that he will have a reasonable opportunity to examine and object to the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; place the respondent under oath; read the allegations in the notice to the respondent and explain them in nontechnical language, and enter the notice and respondent's answer, if any, as exhibits in the record.

(c) *Pleading by respondent.* The special inquiry officer shall require the respondent to state for the record whether he admits or denies the allegations contained in the notice, or any of them, and whether he concedes that his adjustment of status should be rescinded. If the respondent admits all of the allegations and concedes that the adjustment of status in his case should be rescinded under the allegations set forth in the notice, and the special inquiry officer is satisfied that no issues of law or fact remain, he may determine that rescission as alleged has been established by the respondent's admissions. The allegations contained in the notice shall be taken as admitted when the respondent, without reasonable cause, fails or refuses to attend or remain in attendance at the hearing.

§ 246.6 *Decision and order.*

The decision of the special inquiry officer may be oral or written. Except when a determination of rescission is based on the respondent's admissions pursuant to § 246.5(c), the decision shall include a discussion of the evidence and findings as to rescission. The formal enumeration of findings is not required. The order shall direct either that the proceeding be terminated or that the adjustment of status be rescinded. If status was adjusted through suspension of deportation, the rescission order shall further provide that the matter be referred to Congress pursuant to section 246 of the Immigration and Nationality Act. Service of the decision and finality of the order of the special inquiry officer shall be in accordance with, and as stated in §§ 242.19 (a) and (b) and 242.20 of this chapter.

§ 246.7 *Appeals.*

Pursuant to Part 3 of this chapter, an appeal shall lie from a decision of a special inquiry officer under this part to the Board of Immigration Appeals. An appeal shall be taken within 10 days after the mailing of a written decision or the stating of an oral decision. The reasons for the appeal shall be stated briefly in the Notice of Appeal, Form I-290A; failure to do so may constitute a ground for dismissal of the appeal by the Board. When service of the decision is made by mail, as authorized by this section, 3 days shall be added to the period prescribed for the taking of an appeal.

[29 F.R. 7236, June 3, 1964]

§ 246.8 *Reopening or reconsideration.*

Except as otherwise provided in this section, a motion to reopen or reconsider shall be subject to the requirements of § 103.5 of this chapter. The special inquiry officer may upon his own motion, or upon motion of the trial attorney or the respondent, reopen or reconsider any case in which he has made a decision, unless jurisdiction in the case is vested in the Board under Part 3 of this chapter. A motion to reopen will not be granted by a special inquiry officer unless he is satisfied that evidence sought to be offered is material and was not available and could not have been discovered or presented at the hearing.

§ 246.9 *Surrender of Form I-151.*

A respondent whose status as a permanent resident has been rescinded in accordance with section 246 of the Immigration and Nationality Act and this part, shall, upon demand, promptly surrender to the district director having administrative jurisdiction over the office in which the action under this part was taken, the Form I-151 issued to him at the time of the grant of permanent resident status.

Appendix M

TITLE 8, U.S.C.A., CHAPTER 1

PART 246—RESCISSION OF ADJUSTMENT OF STATUS [REVISED]

Subpart A—Substantive Provisions [Reserved]

Subpart B—Procedural and Other Nonsubstantive Provisions

Sec.

246.11 Notice.

246.12 Disposition of case.

246.13 Decision by the regional commissioner.

246.14 Surrender of Form I-151.

AUTHORITY: §§ 246.11 to 246.14 issued under sec. 103, 66 Stat 173; 8 U.S.C. 1103. Interpret or apply secs. 244, 246, 66 Stat. 214, 217; 8 U.S.C. 1254, 1256.

SOURCE: §§ 246.11 to 246.14 appear at 19 F.R. 9179, Dec. 24, 1954.

SUBPART A—SUBSTANTIVE PROVISIONS [RESERVED]

SUBPART B—PROCEDURAL, AND OTHER NONSUBSTANTIVE PROVISIONS

§ 246.11 *Notice.* If it appears to a district director that a person residing in his district was not in fact eligible for the adjustment of status made in his case, he shall cause a notice to be served on such person informing him of the grounds upon which it is intended to rescind the adjustment of status. The

notice shall also inform the person that he may submit, within 30 days from the date of service of the notice, an answer in writing under oath setting forth reasons why such rescission should not be made. The notice shall also advise the person that he may, within such period and upon his request have an opportunity to appear in person, in support or in lieu of his written answer, before an immigration officer designated for that purpose. The person shall further be advised that he may have the assistance of counsel without expense to the government of the United States in the preparation of his answer or in connection with his personal appearance and may examine the evidence upon which it is proposed to base such rescission at a Service office.

§ 246.12 *Disposition of Case*—(a) *Allegations admitted or no answer filed.* If the answer admits the allegations in the notice, or if no answer is filed within the 30-day period, and the status of permanent resident was acquired through suspension of deportation under section 19 (c) of the Immigration Act of February 5, 1917 or under section 244 of the Immigration and Nationality Act, the district director shall forward the file and all of the papers to the regional commissioner, for further action in accordance with section 246 of the Immigration and Nationality Act. If the answer admits the allegations in the notice, or if no answer is filed within the 30-day period, and the status of permanent resident was acquired through adjustment of status other than through suspension of deportation, the district director shall re-

scind the adjustment of status previously granted and no appeal shall lie from such decision.

(b) *Answer filed; personal appearance.* Upon receipt of an answer asserting a defense to the allegations made in the notice without requesting a personal appearance, or if a personal appearance is requested or directed, the case shall be assigned to an immigration officer. Pertinent evidence, including testimony of witnesses, shall be incorporated in the record. At the conclusion of the interview, the immigration officer shall prepare a report summarizing the evidence and containing his findings and recommendation. The record including the report and recommendation of the immigration officer, shall be forwarded to the district director who caused the notice to be served. The district director shall note on the report of the immigration officer whether he approves or disapproves the recommendation of the immigration officer. If the decision of the district director is that the matter be terminated, the alien shall be informed of such decision. If the decision of the district director is that the adjustment of status should be rescinded, the following action shall be taken:

(1) If the status of permanent resident was acquired through suspension of deportation under section 19 (c) of the Immigration Act of 1917 or under section 244 of the Immigration and Nationality Act, the district director shall forward the record to the regional commissioner for further action in accordance with section 246 of the Immigration and Nationality Act.

(2) If the status of permanent resident was acquired through adjustment of status other than through suspension of deportation, the district director shall enter a decision rescinding the adjustment of status previously granted. The alien shall be informed of the decision and of the reasons therefor. From the decision of the district director an appeal may be taken within 10 days from the receipt of notification of the decision as provided in Part 7 of this chapter.

§ 246.13 *Decision by the regional commissioner.* If the decision of the regional commissioner is that the adjustment of status be rescinded and such status was acquired through suspension of deportation, he shall cause further action to be taken as provided in section 246 of the act to present the case to the Congress. In any other case, the record shall be returned to the district director who shall inform the alien of the decision.

§ 246.14 *Surrender of Form I-151.* An alien whose status as a permanent resident has been rescinded or withdrawn in accordance with section 246 of the act and this part, shall, upon demand, promptly surrender to the district director having administrative jurisdiction over the office in which the action under this part was taken the Form I-151 issued to him at the time of the grant of permanent resident status.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1569

JIWAN SINGH, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, an alien from India, was originally admitted to this country as a non-immigrant student in January 1959. In 1963 he married an American citizen and applied for adjustment of his status to that of an alien admitted for permanent residence. The application was granted on October 18, 1963. Thereafter, on September 12, 1968, within the five-year period provided by 8 U.S.C. 1256(a), (Pet. 4-5), the Acting District Director mailed to petitioner a letter notifying him that the Immigration and

Naturalization Service intended to rescind his permanent resident status thirty days after receipt of the notice on the ground that petitioner's marriage to an American citizen, which was the basis for his adjustment of status, was a sham (Pet. App. 48-50). The letter further notified petitioner of his right to reply to the charges in writing or request a hearing before a special inquiry officer (Pet. App. 46). On October 11, 1968, petitioner denied the charges and requested a hearing.

At the hearing on December 6, 1968, the special inquiry officer terminated the recission proceeding on the ground that it was barred by 8 U.S.C. 1256(a), which the officer interpreted as requiring that the hearing be held within the five-year limitations period (Pet. App. 39-45). The Service appealed to the Board of Immigration Appeals which reversed, holding that service of a notice of intention to rescind within the five-year limitations period tolled the running of the statute (Pet. App. 28-38).

Petitioner then brought an action for a declaratory judgment in the United States District Court for the Northern District of California to review the decision of the Board. The district court granted summary judgment in favor of petitioner (Pet. App. 18-24). On appeal, the court of appeals reversed in an extensive opinion, holding, like the Board of Immigration Appeals, that the service of a notice of intention to rescind within the limitations period tolled the statute. (Pet. App. 1-11).

Petitioner's central contention is that 8 U.S.C. 1256(a) requires that the hearing before, and determination by, the special inquiry officer be completed within five years of the adjustment of status, and that the service of the notice of intention to rescind is ineffective to toll the limitations period. This issue was fully canvassed and properly resolved in the opinions of the court of appeals on which we principally rely.

Petitioner suggests that there is a conflict between the decision below and *Quintana* v. *Holland*, 255 F.2d 161 (C.A. 3). We note, as did the court below in distinguishing that case, that *Quintana* was decided under a wholly different—and now superseded—regulatory scheme, and that the considerations which moved the Third Circuit in that case do not apply under the current regulations. The current regulations, modelled on rules of court procedure, separate the prosecutorial duties of the district director from the fact-finding functions of the special inquiry officer (see 8 C.F.R. 246; Pet. App. L, pp. 51-57). Under the regulations in effect when *Quintana* was decided, the alien, served by the district director with a notice of intention to rescind, could request a "personal appearance" before an immigration officer who then "report[ed] and recommend[ed]" to the district director (8 C.F.R. 246, 19 F.R. 9179 (December 24, 1954); Pet. App. M, pp. 58-61). Under those regulations the same individual who initiated the proceeding determined its outcome. Thus, as the court below observed, the district director could avoid

the limitations statute altogether by filing a premature notice and protracting the proceeding to complete his investigations. The current regulations avoid this difficulty by putting the management of the "litigation" in control of an independent fact finder.

Quintana is therefore of dubious validity even in the Circuit which decided the case. This Court need not attempt to resolve a conflict which may not exist.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1972.

CERTIORARI DENIED

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